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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 678

SMOOT SAND AND GRAVEL CORPORATION, PETITIONER

vs.

WASHINGTON AIRPORT, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 24, 1931
CERTIORARI GRANTED MARCH 2, 1931

(35600)

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1 [Caption omitted.]

In Circuit Court of Arlington County, Virginia

WASHINGTON AIRPORT, INCORPORATED, A CORPORATION, plaintiff vs. SMOOT SAND AND GRAVEL CORPORATION, A CORPORATION, Oscar Thomas, John Doe, James Doe, Richard Roe, and William Roe, defendants	In Equity No. 2815

2 *Petition for injunction*

Filed Oct. 9, 1929

To the honorable HOWARD W. SMITH,
Judge of said Court.

The plaintiff respectfully shows unto the court as follows:

1. The plaintiff, Washington Airport, Incorporated, is a corporation duly organized and existing under the laws of the State of Virginia, and brings this suit in its own right.

2. The defendant Smoot Sand and Gravel Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and is sued herein in its own right. The defendants Oscar Thomas, John Doe, James Doe, Richard Roe, and William Roe are each sued herein in his own right; that the names John Doe, James Doe, Richard Roe, and William Roe are not the right names of said defendants; and that said right names of said defendants are unknown to plaintiff; and plaintiff requests that when the right names of the defendants be discovered that this declaration be amended by inserting said right names herein.

3. The plaintiff is now, and all times since the 25th day of June, 1929, has been, the owner in fee simple and in possession of those certain parcels of land situate in Arlington County, Virginia, being parts of land known as Alexander's Island, and particularly described as follows:

Beginning for the one parcel at a point in a southerly line of the military road leading from the Highway Bridge to Arlington, said point being distant 146.86 feet from the intersection of said southerly line with the westerly line of the Virginia approach to the Highway Bridge, said point being at the northwesterly corner of the line of George D. Horning; thence southwesterly with said
3 southerly line to its intersection with the easterly line of Arlington Reservation; thence easterly and southerly with said reservation to the Rosslyn branch of the Pennsylvania Railroad; thence easterly with said railroad to a small triangular parcel of land belonging to the Pennsylvania Railroad Co.; thence easterly and southerly with the boundaries of said parcel back to said branch railroad; thence with the said branch railroad easterly to its intersection with the westerly line of the Washington, Alex-

andria, and Mt. Vernon Electric Railway; thence northerly with said westerly line of said electric railway to its intersection with the westerly line of the Virginia approach to the Highway Bridge; thence northerly with the westerly line of said highway approach to the southeast corner of the parcel of land sold to Louisa Graul by said trustees May 21, 1923; thence westerly with the Graul southerly line 136.09 feet; thence northeasterly with Graul's rear or westerly line 87.73 feet to the southwesterly corner of the parcel of land sold to George D. Horning by said trustees Nov. 1, 1926; thence with Horning's westerly line northeasterly and northerly to the point of beginning.

The second parcel being a small triangular parcel of land lying between the said electric railway and said highway approach, and described as follows:

Beginning for the same at the intersection of the said electric railway and the westerly line of said highway approach; thence southerly with said highway approach 136 feet, more or less, to the land leased by the said trustees to the Stewart Storage Corporation; thence westerly at a right angle to the said highway approach 51 feet, more or less, to the easterly line of the right of way of said electric railway company; thence northerly with said easterly line of the railway company to the point of beginning.

The third parcel of land, now occupied as an amusement park and leased under the name of Arlington Beach Park, Incorporated, and described as follows:

Beginning for the same at the northerly end of the westerly line of the Virginia approach to the Highway Bridge, as said
4 approach is described in the deed from William M. Lewin, substituted trustees, et al., to the United States of America (recorded in D. B. 111, page 56); thence southerly with the westerly line of said approach to the intersection of the military road to Arlington; thence northwesterly with said military road to the point where it intersects the southeasterly line of the land sold to James G. Nagel by said trustees; thence with the said line of the land sold to Nagel, north 32 degrees 27 minutes, east 528.27 feet, to the low-water mark on Boundary Channel of the Potomac River; thence southerly with the low-water mark of said channel, and of the Potomac River, to the point of beginning.

Said three above-described parcels of land being part of the same property which was conveyed to the said parties of the first part by deed recorded in deed book No. 122, at page 4, of the said land records.

4. That the plaintiff acquired title to said property by deed of conveyance executed on the 25th day of June, 1929, by H. Rozier Dulany and R. Walton Moore, trustees, and recorded on the same day in the land records of Arlington County, Virginia. That said deed of conveyance contains the following provision, to wit:

"The above-described property is conveyed to the said party of the second part, together with all rights, easements, ways, waters, and improvements thereunto appertaining."

A copy of said deed of conveyance is hereunto annexed and made a part hereof, marked "Exhibit A."

5. That a portion of the said property, to wit, that portion described in said deed as "parcel three," is adjacent to the Potomac River immediately opposite the city of Washington, in the District of Columbia, and has a frontage of approximately 1,800 feet along the said Potomac River; that under the provisions of said deed the portion thereof which is contiguous to said river extends to the low-water mark thereof; and the plaintiff is informed as a matter of law, and therefore alleges, that its title extends for the full length of said portion contiguous to said river to the low-water mark of said Potomac River on the southern or Virginia shore thereof; that plaintiff is the owner in fee simple of all land lying between the low-water mark of said Potomac River and the high-water mark of said river which is contiguous to and opposite the high land also owned by plaintiff, said high land being a portion of said "parcel three," as hereinbefore described; that said land owned by plaintiff and lying between said low and high water mark as aforesaid is covered and uncovered by the ordinary flow and ebb of the tide and is hereinafter referred to as "said tide land."

6. That the plaintiff purchased all the said parcels of land, including said tide land, for the purpose of operating an airport and seaplane base thereon, where airplanes, seaplanes, hydroplanes, and other aircraft could land and take off without obstruction, and for the further purpose of a high-grade real-estate development along the water front, including a large hotel or apartment house, or both, a dancing and amusement pavilion; an open-air restaurant affording an unobstructed *veiw* of the water, and the further construction of terraces extending down to the water from which boating, swimming, bathing, and other aquatic amusements may be conducted from properly constructed wharves, piers, or other water-front facilities; and that, for the purpose of carrying out said intentions on the part of the plaintiff, negotiations have been had with operators of hotels, restaurants, and other places of amusement and with architects and engineers, with the general purpose and intention in mind of establishing on said premises structures and facilities of exceptional and distinctive beauty; that since the said purchase plaintiff has continuously operated an airport on said property as a commercial business; that plaintiff paid a large sum of money for said property, to wit, the sum of $675,000, and has spent and is continuing to spend large sums of money in the improvement of the same; that said tide land, being a portion of said property so purchased by plaintiff, is of great value, and in view of the purpose for which plaintiff purchased said tide land and intends to use the same is of peculiar and special value to plaintiff.

7. That the plaintiff derives its revenue principally from the operation of airplanes and the carrying of passengers by airplanes for hire, and in making the large expenditures hereinabove referred to in the purchase of said land plaintiff contemplated and

intended the continued operation of airplanes, as well as seaplanes, in order to produce revenues, and also intended and now intends, unless prevented by the wrongful acts of defendants as hereinafter set forth, to make use of the said tide land for the operation of a seaplane port, and to provide free and unobstructed access from the said property of plaintiff to the main channel of the Potomac River; that in addition to operating said airplanes and seaplanes port as aforesaid, and the other lines of business above mentioned, plaintiff has intended and now intends at some future time to conduct other kinds of business on portions of said property so owned by it, and in connection with the said business, including the operation of said airplane and seaplane port, plaintiff has intended and now intends to build piers, wharves, and docks in said river in front of and adjacent to said tide land owned by plaintiff; that in connection with the business of operating said airplane port and seaplane port, as well as such other business as plaintiff may operate in the future, it is necessary and essential to the successful operation of said various kinds of business that there be free and unobstructed access to said Potomac River and to the wharves, piers, and docks that plaintiff intends to build along the main channel of said river.

8. That the defendants did on or about the 19th day of September, 1929, wrongfully, and without the consent or knowledge of the plaintiff, enter upon the said tide land, being a portion of the property of plaintiff, and by means of a dredging boat or other appliance or appliances proceeded to make excavations upon the said tide land, the property of plaintiff, and to fill certain portions thereof by dumping large quantities of said gravel, rock, refuse, and other materials thereon, and said defendants have at all times since the date last herein mentioned continued said dredging and filling operations, and the plaintiff is informed and believes and therefore alleges that it is the purpose and intention of the defendants so to continue said operations; that as a portion of said operations defendants are now
7 engaged in building a large rock wall on and completely across said tide land, which said wall will completely destroy the value of said tide land for the purpose of a seaplane or hydroplane port; that the construction of said rock wall and said filling with sand, gravel, and other material will cut off plaintiff's access to the said river and to the wharves, piers, and docks intended to be erected by plaintiff, and will destroy the value of said property as a site for hotels, apartment houses, and restaurants by cutting off access to said river and by destroying the free and unobstructed view of said river, which is essential to the successful conduct of said various kinds of business, and will entirely prevent plaintiff from using its said property in the manner intended by plaintiff.

9. Plaintiff further states that even since the acquisition of the above-described property it has leased a portion thereof contiguous to the Potomac River for the purpose of operating an amusement park, pleasure resort, and bathing beach, and that the property, including the said tide land, has been continuously used, at high

tide, for swimming, diving, bathing, boating, and other aquatic sports, and that plaintiff proposes to continue to use the said property, including said tide land, for said purposes, and that the dredging and filling of said land by the defendants as aforesaid and the construction of a rock wall by defendants as aforesaid will completely destroy the value of said tide land for the purposes in this paragraph set forth, and will entirely prevent plaintiff and its lessees from using the same for said purposes.

10. Plaintiff further states that the said unlawful and wrongful acts of defendants, unless restrained by this court, will cause a large portion of said tide lands so belonging to plaintiff, approximately twenty acres thereof, to be fully destroyed or its character entirely changed, and will cause the shore line of said river to be changed, and that plaintiff's access from its said property to the channel of said river will be wholly impeded and cut off by the said dredging, filling, and construction operations of the defendants.

11. Plaintiff states further that unless the defendant is
8 enjoined by a court of equity from its said unlawful and wrongful dredging and filling of, and construction upon, plaintiff's property, the plaintiff will suffer great and irreparable injury and damage for which it will have no adequate remedy at law.

Wherefore, the premises considered, the plaintiff prays as follows:

(a) That proper process issue in this case directed to said defendants requiring each of them to appear and answer this suit.

(b) That an injunction be issued by this honorable court ordering the defendants to remove their property, machinery, and appliances from the said land of the plaintiff, and restraining the said defendants and each of them, their agents, and servants from again entering upon the said property of the plaintiff and from placing machinery and appliances thereon, and from dredging, filling, excavating, constructing, or doing any other act upon or about the land or premises of the plaintiff.

(c) That such retraining orders and/or temporary injunctions herein as may be requisite to preserve the plaintiff's right, or otherwise, be issued, and that on final hearing the same be made permanent.

(d) That such further and other relief herein may be granted to the plaintiff as may seem meet and proper.

WASHINGTON AIRPORT, INCORPORATED,
By HOWARD SUTHERLAND, *President.*

C. BASCOM SLEMP,
LOUIS TITUS,
EDMUND BURKE,
GEORGE V. TRIPLETT, Jr.
WALTER T. MCCARTHY,
Attorneys for Plaintiff.

[*Duly sworn to by Howard Sutherland; jurat omitted in printing.*]

Exhibit A to petition

Recorded 6/25/29.

This deed, made this 25th day of June, 1929, by and between H. Rozier Dulany and R. Walton Moore, surviving trustees, under that certain deed in trust dated December 23rd, 1909, and recorded in deed book No. 122, at page 4, of the land records of Arlington County, Virginia, parties of the first part, and Washington Airport, Incorporated, a corporation organized and existing under the laws of the State of Virginia, party of the second part:

Witnesseth, that for and in consideration of the sum of six hundred seventy-five thousand ($675,000.00) dollars, the said parties of the first part do grant and convey, with special warrant, unto the said party of the second part, all those parcels of land situate in Arlington County, Virginia, and being parts of land known as Alexander's Island, and particularly described as follows:

Beginning for the one parcel at a point in a southerly line of the military road leading from the Highway Bridge to Arlington, said point being distant 146.86 feet from the intersection of said southerly line with the westerly line of the Virginia approach to the Highway Bridge, said point being at the northwesterly corner of the line of George D. Horning; thence southwesterly with said southerly line to its intersection with the easterly line of Arlington Reservation; thence easterly and southerly with said reservation to the Rosslyn branch of the Pennsylvania Railroad; thence easterly with said railroad to a small triangular parcel of land belonging to the Pennsylvania Railroad Co.; thence easterly and southerly with the boundaries of said parcel back to said branch railroad; thence with the said branch railroad easterly to its intersection with the westerly line of said electric railway to its intersection, Vernon Electric Railway; thence northerly with said westerly line of said electric railway to its intersection with the westerly line of the Virginia approach to the Highway Bridge; thence northerly with the westerly line of said highway approach to the southeast corner of the parcel of land sold to Louise Graul by said trustees May 21, 1923; thence westerly with the Graul southerly line 136.09 feet; thence northeasterly with Graul's rear or westerly line 87.73 feet to the southwesterly corner of the parcel of land sold to George D. Horning by said trustees Nov. 1, 1926; thence with Horning's westerly line northeasterly and northerly to the point of beginning.

The second parcel being a small triangular parcel of land lying between the said electric railway and said highway approach, and described as follows:

Beginning for the same at the intersection of the said electric railway and the westerly line of said highway approach; thence southerly with said highway approach 136 feet, more or less, to the land leased by the said trustees to the Stewart Storage Corporation; thence westerly at a right angle to the said highway approach

51 feet, more or less, to the easterly line of the right of way of said electric railway company; thence northerly with said easterly line of the railway company to the point of beginning.

The third parcel of land, now occupied as an amusement park and leased under the name of Arlington Beach Park, Incorporated, and described as follows:

11 Beginning for the same at the northerly end of the westerly line of the Virginia approach to the Highway Bridge, as said approach is described in the deed from William M. Lewin, substituted trustee, et al., to the United States of America (recorded in D. B. 111, page 56); thence southerly with the westerly line of said approach to the intersection of the military road to Arlington; thence northwesterly with said military road to the point where it intersects the southeasterly line of the land sold to James G. Nagel by said trustees; thence with the said line of the land sold to Nagel, north 32 degrees 27 minutes, east 528.27 feet, to the low water on Boundary Channel of the Potomac River; thence southerly with the low-water mark of said channel, and of the Potomac River, to the point of beginning.

Said three above-described parcels of land being part of the same property which was conveyed to the said parties of the first part by deed recorded in deed book No. 122, at page 4, of the said land records.

The above-described property is conveyed to the said party of the second part, together with all the rights, easements, ways, waters, and improvements thereunto appertaining, and particularly those rights reserved unto the said parties of the first part by:

1. A deed to the United States of America, and recorded in deed book No. 127, at page 596, of the land records of said county.

2. A deed to George D. Horning, recorded in deed book No. 138, at page 70, of the said land records.

3. A deed to Abraham Burnstine, recorded in deed book No. 138, at page 72, of the said land records.

4. A deed to Robert B. Swope, recorded in deed book No. 161, at page 142, of the said land records.

5. A deed to the American Oil Company, recorded in deed book No. 240, at page 268, of the land records of said county.

12 Subject, however, to certain leases upon parts of the above property which are now particularly described as:

1. A lease to Robt. E. Funkhouser, dated Oct. 4, 1927, which expires on the 15th day of Oct. 1930.

2. A lease to General Outdoor Sign Co., dated Apr. 6, 1928, which is subject to discontinuance upon 30 days' notice.

3. A lease to Thos. Cusack Co., dated Oct. 1, 1923, which is subject to discontinuance on 30 days' notice.

4. A lease to Lloyd B. Schaeffer, dated Feb. 2, 1925, which expires on the 2d day of Feb. 1935, and assigned by him to Arlington Beach Park, Incorporated.

5. A lease to Thos. G. Walker (assigned to Peter Gleakas), dated April 1, 1925, which expires on the 1st day of April, 1930.

6. Two leases to Robert E. Funkhouser, terminating October 15, 1932.

7. To monthly tenancy of Frank Nelson.

The said parties of the first part covenant that they have done no act to encumber the above-described land, and that they will execute such further assurances of the said land as may be requisite.

Witness the following signatures and seals.

(Signed) H. ROZIER DULANY, [SEAL.]
Surviving Trustee.

(Signed) R. WALTON MOORE, [SEAL.]
Surviving Trustee.

DISTRICT OF COLUMBIA, *to wit:*

I, Robert E. P. Kreiter, a notary public in and for the District of Columbia aforesaid, whose commission expires on the 28th day of October, 1932, do hereby certify that H. Rozier, Dulany, sur-
13 viving trustee, whose name is signed to the foregoing deed, bearing date of the 25th of June, 1929, has acknowledged the same before me in my District of Columbia aforesaid.

Given under my hand and seal this 25th day of June, 1929.

(Signed) ROBERT E. P. KREITER,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *to wit:*

I, Robert E. P. Kreiter, a notary public in and for the District of Columbia aforesaid, whose commission expires on the 28th day of October, 1932, do hereby certify that R. Walton Moore, surviving trustee, whose names is signed to the foregoing deed, bearing date of the 25th day of June, 1929, has acknowledged the same before me in my District of Columbia aforesaid.

Given under my hand and seal this 25th day of June, 1929.

(Signed) ROBERT E. P. KREITER,
Notary Public, D. C.

Executed the within petition for injunction this 9th day of October, 1929, by serving a true copy thereof on W. F. Taylor, mentioned in said suit as Richard Roe, and by serving a true copy thereof on John S. Ward, mentioned in said suit as James Doe, in person, in Arlington County, Virginia, the said Smoot Sand and Gravel Corp., a corporation, Oscar Thomas & John Doe and William Roe not being found in my bailiwick.

Given under my hand this 9th day of October, 1929.

H. B. FIELDS,
Sheriff, Arlington County, Va.

Executed on the 10th day of October, 1929, by delivering a true copy of the within petition, in writing, to each of the following-named defendants in person:

14 William Roe, whose real name is Consie White; John Doe, whose real name is Oscar Peterson; Oscar Thomas; and there

being no statutory agent of the within-mentioned defendant foreign corporation, the within petition was executed on the 10th day of October, 1929, by delivering a true copy thereof to Oscar Peterson, foreman in charge of the work complained of in this cause, and who is an agent of such corporation; all of the aforesaid copies having been delivered at a point in the Potomac River described in the petition in this suit as "tide lands," and above the low-water line situate on the south shore of said river near the end of the Highway Bridge, opposite Washington, District of Columbia, and alleged in said suit to be in Arlington County, Virginia.

Given under my hand this 12th day of October, 1929.

HERBERT T. BAKER,
Constable, Jefferson Magisterial District,
Arlington County, Virginia.

In Circuit Court of Arlington County

[Title omitted.]

Petition for removal

Filed Oct. 21, 1929

The honorable HOWARD W. SMITH,
Judge of said Court.

Your petitioner, Smoot Sand & Gravel Corporation, a corporation duly chartered organized and existing under the laws of the State of Delaware, appearing specially for the sole purpose of presenting this petition for removal and expressly reserving all exceptions and objections which may be had or taken to the jurisdiction of this court, respectfully shows unto your honor as follows:

That it is one of the defendants in this suit, that said suit is of a civil nature, and that the amount in controversy exceeds the sum or value of three thousand dollars ($3,000.00), exclusive of interests and costs.

15 That the controversy herein is between citizens of different States; that is to say, the complainant was at the time of the commencement of this suit and still is a corporation chartered, organized, and existing under the laws of the State of Virginia, and that your petitioner, Smoot Sand & Gravel Corporation, was at the time of the commencement of this suit and still is a chartered, organized, and existing corporation under the laws of the State of Delaware; and that your petitioner desires to remove this cause before trial thereof to the District Court of the United States to the Eastern District of Virginia at Alexandria, Virginia.

That petitioner alone is and has been at all times material to this controversy carrying on said work of dredging, filling, and construction, and that in the prosecution of such work petitioner is acting pursuant to the authority of the United States of America,

contained in a certain written contract between the petitioner and the United States of America, dated September 20, 1929.

Petitioner further shows unto the court that all the machinery, property, and appliances referred to in the bill belong to and are controlled and operated by petitioner alone, and that none of the other defendants herein have any interest in or control over the same.

Petitioner further shows unto the court that said William F. Taylor and John S. Ward, named as defendants in this suit, have no interest in or connection with the work and operations complained of in the bill and have no interest whatsoever in this controversy, but are and at all times material hereto have been inspectors employed by the United States Government.

Petitioner further shows unto the court that Richard Roe, alias Consie White, John Doe, alias Oscar Peterson, and Oscar Thomas, also named as defendants herein, have no real or substantial interest whatever in this controversy and that the joining of them as defendants herein was and is merely a sham or device to prevent petitioner from removing this case to the United States Court and that they were joined as defendants with no real intention by the complainant of prosecuting this suit against them to a conclusion; that said Consie White, Oscar Peterson, and Oscar Thomas are the mere servants or employees of the petitioner, have no interest or control over any of said work or operations, and have no
16 interest in or control over any of the machinery, property, and appliances referred to in the bill, but that all of these three defendants are subject and amenable to the order and direction of the Smoot Sand & Gravel Corporation.

That shortly before this present suit was instituted complainant instituted in this honorable court a suit against Smoot Sand & Gravel Corporation, a Virginia corporation, and complaining of the same alleged trespasses and wrongs and praying for the same relief in the same language, and not until complainant discovered that you petition, and not the Virginia corporation was carrying on said work, did complainant conceive the idea of joining others as defendants, although the facts were identical in each case.

Petition further shows unto the court that a decree against said White, Peterson, and Thomas would in no wise affect this controversy or afford complainant any substantial relief from the alleged trespasses and wrongs of which it complains, and that the entire controversy shown and alleged by the bill could be fully and finally adjudicated between complainant and this petitioner alone without the presence of said William F. Taylor, John S. Ward, Consie White, Oscar Thomas, and Oscar Peterson, or any or either of them.

Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, that it will within thirty days from this day file in said District Court a certified copy of the record in this suit, and for the payment of all costs which may

be awarded by the said court if the District Court of the United States should hold that this suit was wrongfully or improperly removed thereto.

Petitioner therefore prays that this honorable court proceed no further herein except to make the order of removal as required by law and to accept the said bond presented herewith and direct a transcript of the record herein to be made for said District Court, as provided by law and as in duty bound, your petitioner will ever pray.

SMOOT SAND & GRAVEL CORPORATION,
A Delaware Corporation.
LEWIS E. SMOOT, *President.*
GARDNER L BOOTHE, *Counsel.*

17 [*Duly sworn to by Lewis E. Smoot; jurat omitted in printing.*]

In Circuit Court of Arlington County

[Title omitted.]

Decree ordering cause removed to District Court of United States

Oct. 21, 1929

This day came the defendant, Smoot Sand & Gravel Corporation, a corporation duly organized and existing under the laws of the State of Delaware, and presented its petition and bond in accordance with act of Congress in such cases made and provided for the removal of this suit to the District Court of the United States for the Eastern District of Virginia at Alexandria, Virginia,
18 which said petition was duly verified; and it appearing to the Court form the said petition that said Smoot Sand & Gravel Corporation is a corporation duly chartered, organized, and existing under the laws of the State of Delaware, and that the complainant is a corporation duly chartered, organized, and existing under the laws of the State of Virginia, that this is a suit of civil nature and that the amount in controversy exceeds the sum or value of three thousand dollars ($3,000.00), exclusive of interest and costs, and that as to the said Smooth Sand and Gravel Corporation this is a removable cause, and that the bond tendered by the said petitioner is in accordance with the law, and that written notice of the filing of said petition and bond for removal has been duly given to the complainant prior to the filing of same, it is accordingly adjudged and ordered that this suit be, and the same hereby is, removed to said District Court of the United States for the Eastern District of Virginia at Alexandria, Virginia, and it is further ordered that upon the payment to him of the proper costs the clerk of this court do forthwith, upon the application therefor by petitioner, prepare and deliver to the petitioner a certified copy of the

record in this suit. To the entry of this order the complainant objects.

HOWARD W. SMITH, *Judge.*

[Clerk's certificate to foregoing transcript omitted in printing.]

19 [Judges's certificate to clerk omitted in printing.]
[Clerk's certificate to judge omitted in printing.]

In United States District Court

Defendant's motion to dismiss plaintiff's petition for injunction

Filed November 8th, 1929

Defendant, Smoot Sand & Gravel Corporation, moves to dismiss the bill upon the following grounds:

1. The allegations of the bill show that this court is without any jurisdiction over the subject matter in controversy.

20 2. The bill shows that the land in controversy does not lie within the jurisdiction of this court but does lie in the District of Columbia.

3. The District of Columbia extends to high-water mark on the Virginia side or south side of the Potomac River. The bill alleges that the land claimed by complainant, and on which the operations complained of are being prosecuted, lies between high-water mark and low-water mark on the south side of the Potomac River, and therefore said land is in the District of Columbia and not the property of complainant and is beyond the jurisdiction of this court.

4. The allegations of the bill show that the land in controversy lies in the District of Columbia and is therefore the property of the United States of America.

(Signed) GARDNER L. BOOTHE,
Counsel for Defendants.
L. B. WAY,
PAUL W. KEAR,
Of Counsel.

In United States District Court, Eastern Virginia

WASHINGTON AIRPORT, INC., PLAINTIFF
vs.
SMOOT SAND AND GRAVEL CORPORATION ET ALS., defendants
} In Equity No. 25

Memorandum on motion to dismiss the bill

Filed Jan. 16, 1930

After mature consideration I have reached the conclusion that the bill should be dismissed for lack of jurisdiction.

The decision of the Supreme Court in the case of Morris vs. United States, 174 U. S. 196, conclusively establishes that the original grant to Lord Baltimore covered "the whole bed and soil of the Potomac River, from bank to bank, and from its source to its mouth." This title was not impaired by the compact between Virginia and Maryland in 1785. It "was a regulation of
21 commerce" and "left the question of boundary open to long-continued disputes." Marine Ry. vs. United States, 257 U. S. 47. The arbitration award of 1877 was limited to the boundary between Virginia and Maryland, and was without effect on the District of Columbia, which succeeded to the rights of Maryland, in 1791. "That was an arbitration between the two States and did not purport to affect the boundary of the District." Marine Ry. case, supra, page 64. There is nothing in Maryland vs. West Virginia, 217 U. S. 1, in conflict with this conclusion. In the subsequent opinion, in the same volume at pages 578–579, the Supreme Court said: "In the former hearing, however, and in the decision rendered, the attention of the court was not directed to the question whether the boundary of Maryland should be at high-water mark or at a low-water mark along the southern bank of the Potomac River. As stated in the former opinion, after the State of West Virginia was created, an arbitration was had between the States of Virginia and Maryland, and the Virginia boundary was fixed at low-water mark on the south shore of the Potomac." The opinion proceeds to explain the circumstances under which the agreement of 1877 was reached, namely, that by prescription the State of Virginia and her citizens had acquired the property rights on the shores of the southern bank of the Potomac, with the privilege of extending wharves from the upland to the line of navigability, and the decision giving effect to the agreement made on this basis established the low-water mark on the south shore of the Potomac as the boundary between West Virginia and Maryland. But there is no like right of prescription as against the District, and there is no force as to the suggestion that the arbitration agreement of '77 is binding on the District. On the contrary, the acts of Congress on the subject demonstrate very clearly the claim of the United States to the whole river bed. Marine Ry. case, supra, pages 65 and 66.

What is said above is not to be taken as an expression of opinion as to the right of the plaintiff to damages for the taking of his property, if that should be the effect of the work now in progress. If, as an upland proprietor, he has, under the compact of 1785, the right of access to the navigable portions of the river, and if
22 the effect of the work in progress is to deny him this privilege, a right to compensation may follow, but that question may not be determined, in my opinion, in this court for the reasons stated above.

In United States District Court

WASHINGTON AIRPORT INCORPORATED, PLAINTIFF vs. SMOOT SAND & GRAVEL CORPORATION ET ALS. defendants	In Equity No. 25

Decree dismissing plaintiff's petition for injunction

Entered and filed January 23, 1930

On the 8th day of November, 1929, came complainant, Washington Airport, Incorporated, and defendant, Smoot Sand & Gravel Corporation, by their respective attorneys, and upon motion of complainant, Washington Airport, Incorporated, by its attorneys defendants, William F. Taylor, John S. Ward, Oscar Thomas, Richard Roe, alias Consie White, and John Doe, alias Oscar Peterson, were dismissed as parties to these proceedings.

Thereupon defendant, Smoot Sand & Gravel Corporation, by leave of court, filed its motion to dismiss the bill of complaint upon the grounds set forth in said motion, and this cause then came on to be heard upon said motion to dismiss the bill, which motion was fully argued both orally and by briefs, by counsel for said complainant and the defendant, Smoot Sand & Gravel Corporation, respectively.

And the court having maturely considered said motion to dismiss the bill, doth, for the reasons stated in writing and hereby made a part of the record in this cause, sustain said motion, and it is accordingly adjudged, ordered, and decreed that the bill of complaint be, and the same hereby is, dismissed.

(Signed) D. LAWRENCE GRONER,
United States Judge.

JANUARY 21, 1930.

23 In United States District Court.

Memorandum of clerk re appeal papers

Petition for appeal (filed March 12th, 1930).

Order allowing appeal and fixing amount of appeal bond (entered and filed March 18, 1930).

Appeal bond (filed March 18th, 1930).

Dated: March 17th, 1930.

Penalty: One thousand ($1,000.00) dollars.

Obligors: Washington Airport, Incorporated, and United States Fidelity and Guaranty Company.

Conditioned to pay all costs.

Citation (issued March 17th, 1930).

Legal service accepted by Gardner L. Boothe, counsel for appellee, on March 18th, 1930.

In United States District Court

Assignment of errors

Filed March 12th, 1930

Comes now the plaintiff, prosecuting an appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decree rendered and entered herein on the 23rd day of January, 1930, and assigns the following errors committed by the court in the above-entitled case, upon which errors the plantiff will rely in the prosecution of said appeal.

24

I

The court erred in holding that it was without jurisdiction of this suit, and in dismissing the plaintiff's petition for injunction, for the reason that the property which is the subject of this suit lies above the low-water line on the southern or Virginia shore of the Potomac River, opposite the District of Columbia, and as a matter of law is within the State of Virginia and the jurisdiction of this court.

II

The court erred in failing to hold as a matter of law that the boundary of the State of Virginia extends to the low-water line on the southern or Virginia shore of the Potomac River, opposite the District of Columbia, for the reason that the said boundary has been so established as a matter of law by compact between Maryland and Virginia in 1785 and by subsequent decisions of the Supreme Court of the United States.

Wherefore plaintiff prays that the said decree herein be reversed, with instructions to the District Court to overrule the said defendants' motion to dismiss plaintiff's petition.

(Signed) C. Bascom Slemp,
(Signed) Louis Titus,
(Signed) Geo. V. Triplett, Jr.
(Signed) Walter T. McCarthy,
Attorneys for Plaintiff.

In United States District Court

Stipulation of counsel as to what shall constitute the record on appeal

Filed April 21st, 1930

It is hereby stipulated between counsel for the respective parties that the record in this case upon appeal shall be and shall consist of the following:

1. Plaintiff's petition for injunction filed in the Circuit Court of Arlington County, Va.

25 2. Petition of defendant, Smoot Sand and Gravel Corporation, for removal of said cause to the District Court of the United States for the Eastern District of Virginia.

3. Decree of the Circuit Court of Arlington County ordering the removal of said cause.

4. Clerk's authentication of transcript.

5. Defendant's motion herein to dismiss plaintiff's petition for injunction.

6. Memorandum for the court granting defendant's motion and dismissing plaintiff's petition.

7. Decree entered herein January 23, 1930, sustaining defendant's motion to dismiss and dismissing plaintiff's petition for injunction.

8. Plaintiff's petition for appeal.

9. Plaintiff's assignment of errors.

10. Court's order allowing appeal and fixing bond.

11. Bond on appeal.

12. Citation on appeal.

13. This stipulation.

14. Clerk's certificate.

(Signed) C. BASCOM SLEMP,
(Signed) LOUIS TITUS,
(Signed) GEO. V. TRIPLETT, Jr.
(Signed) WALTER T. MCCARTHY,
Counsel for Plaintiff.
(Signed) PAUL W. KEAR,
(Signed) LUTHER B. WAY,
Attorneys for Defendant.

26 In United States District Court

Stipulation to prepare transcript of record and print same under rule 23 of the United States Circuit Court of Appeals for the Fourth Circuit.

Filed April 25, 1930

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above-styled cause and transmit the same to the clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.,, and that it be printed under the supervision of the clerk of that court, in accordance with rule 23.

(Signed) WALTER T. MCCARTHY,
Counsel for Appellants.
(Signed) PAUL W. KEAR,
(Signed) LUTHER B. WAY,
Counsel for Appellee.

[Clerk's certificate to foregoing transcript omitted in printing.]

27 In United States Circuit Court of Appeals for the Fourth Circuit

No. 3026

WASHINGTON AIRPORT, INCORPORATED, APPELLANT

VERSUS

SMOOT SAND AND GRAVEL CORPORATION, APPELLEE

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Alexandria. In equity

April 25, 1930, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under sec. 7 of rule 14.

Same day, the appearance of C. Bascom Slemp, Louis Titus, and Lucius Q. C. Lamar is entered for the appellant.

April 28, 1930, the appearance of Gardner L. Boothe and Luther B. Way is entered for the appellee.

May 1, 1930, the appearance of Paul W. Kear, U. S. attorney, and Luther B. Way, special assistant to the U. S. attorney, is entered for the appellee.

28 May 2, 1930, the appearance of Thomas W. Phillips is entered for the appellant.

May 8, 1930, twenty-five copies of the printed record are filed.

May 22, 1930, stipulation of counsel as to the time for the filing of the respective briefs is filed.

ARGUMENT OF CAUSE

June 27, 1930 (June term, 1930), cause came on to be heard before Parker and Northcott, circuit judges, and Ernest F. Cochran, district judge, and is argued by counsel and submitted.

In United States Circuit Court of Appeals

Order granting leave to John R. Saunders, attorney general of the State of Virginia, to intervene and file brief as amicus curiæ

Filed and entered June 27, 1930

Upon the application of John R. Saunders, attorney general of the State of Virginia, and the consent of counsel for the respective parties in the above-entitled cause,

Leave is hereby granted John R. Saunders, attorney general of the State of Virginia, on behalf of the Commonwealth of Virginia, to intervene and file a brief as amicus curiæ in the above-entitled

cause, provided said brief is filed within thirty days from this date, and the parties before the court are allowed thirty days thereafter within which to file a brief in reply if they are so advised.

June 27, 1930.

JOHN J. PARKER,
U. S. Circuit Judge, Presiding.

29 In United States Circuit Court of Appeals, Fourth Circuit

No. 3026

WASHINGTON AIRPORT, INCORPORATED, APPELLANT

VERSUS

SMOOT SAND AND GRAVEL CORPORATION, APPELLEE

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Alexandria

Argued June 27, 1930. Decided October 21, 1930

Before PARKER and NORTHCOTT, Circuit Judges, and ERNEST F. COCHRAN, District Judge

Louis Titus (C. Bascom Slemp on brief) for appellant, and Luther B. Way and J. P. Wenchel, special assistants to the United States attorney (Paul W. Kear, U. S. attorney, and Elton L. Marshall, Seth W. Richardson and Gardner L. Boothe on brief), for appellee, and John R. Saunders, attorney general (Edwin H. Gibson and Collins Denny, jr., assistants attorney general on brief), as amicus curiæ on behalf of the Commonwealth of Virginia.

Opinion

Filed October 21, 1930

30 PARKER, Circuit Judge:

This suit was instituted in the court below to enjoin alleged trespasses on land between high and low water mark on the Virginia side of the Potomac River opposite the District of Columbia. The learned district judge, being of opinion that the boundary of Virginia extended only to high water mark, dismissed the bill for lack of jurisdiction; and complainant has appealed. The sole question presented is whether the boundary line between Virginia and the District of Columbia is at high or at low water mark on the Virginia side of the Potomac.

On May 23, 1609, King James I of England granted to the Commonwealth of Virginia a tract of land extending two hundred miles northward from Point Comfort. This, of course, embraced all of

the Potomac River and much territory beyond. In 1632 King Charles I made a grant to Lord Baltimore, including substantially what is now the State of Maryland, the southern boundary of which was described in part as "to the farther bank of said river and following it." In 1688 King James II granted to Lord Culpeper what is now known as the Northern Neck of Virginia, including "the Potomac River and all the islands within the outermost banks thereof."

These conflicting grants led to considerable controversy, which the State of Virginia attempted to settle in her constitution adopted June 29, 1776, wherein she surrendered her claim to the territory of Pennsylvania and Maryland, but asserted her right to the free navigation and use of the Potomac and Pocomoke rivers and to property in the Virginia shores and strands thereof, the particular provision being as follows:

"The territories contained within the charters, erecting the colonies of Maryland, Pennsylvania, North and South Carolina are hereby ceded, released and forever confirmed, to the people of these
31 colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever, which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomoque and Pokomoke, *with the property of the Virginia shores and strands, bordering on either of said rivers*, and all improvements which have been or shall be made thereon." (Italics ours.)

The Code of Virginia, in accordance with the claim in her constitution, asserts jurisdiction over the Virginia shores and strands of the Potomac (see section 9 of Virginia Code); and it is admitted that these terms include the lands between high and low water mark.

On March 28, 1785, a compact was entered into between commissioners appointed by the States of Maryland and Virginia, for the purpose of settling their rights and the rights of their citizens in the Potomac River and other waters, article 7 thereof being as follows:

"Seventh. *The citizens of each State, respectively, shall have full property in the shores of Potowmack river adjoining their lands*, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both States: Provided, that such common right be not exercised by the citizens of the one State to the hinderance or disturbance of the fisheries *on the shores of the other State;* and that the citizens of neither State shall have a right to fish with nets or seines *on the shores of the other.*" (Italics ours.)

This compact was entered into after the States of Maryland and Virginia had acquired their independence and before the adoption

of the Federal Constitution or the formation of the District of Columbia. It will be noticed that it recognized the rights of property of the citizens of the respective States in the shores of the
32 river adjoining their lands, and also that it recognized the "shores" of the river as belonging to the respective States and not to the State of Maryland alone. The proviso that the right of fishing should not be exercised by the citizens of one State to the disturbance of the fisheries "on the shores of the other State," and that the citizens of neither State should have a right to fish with nets or seines "on the shores of the other," was a clear recognition of the fact that the shores on the Virginia side of the river were under the jurisdiction of the State of Virginia. It would have been absurd to have confirmed the right of property in the Virginia shores to the citizens of Virginia and at the same time to have reserved to the State of Maryland political jurisdiction over those shores, so that controversies over titles thereto would be justiciable only in Maryland and crimes committed thereon punishable only in Maryland courts. The compact did not settle or purport to settle whether the line of Virginia followed the shore line of the river in case of indentations, bays, etc., or whether it extended from headland to headland, a question which later led to frequent disputes; but it unquestionably did settle the jurisdiction of that State and the rights of its citizens as extending to low-water mark on the river. As said by the Supreme Court in Maryland *v.* West Virginia, 217 U. S. 577, 580:

"The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, sec. 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. *We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark.* There is no evidence that Maryland has claimed any right to make grants on that side of the
33 river, and the privileges reserved to the citizens of the respective States in the compact of 1785 and its subsequent ratifications indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river." (Italics ours.)

That case, we think, is directly in point. There the line between Maryland and West Virginia was involved. West Virginia was claiming under Virginia, just as the rights of the District of Columbia here arise under grant from Maryland. After the rendition of the first opinion in that case, reported in 217 U. S. 1, a question arose as to whether the boundary of West Virginia extended to high or to low water mark on the Potomac. The Supreme Court held that it extended to low-water mark, basing its decision on the compact of 1785 and using the language which we have quoted above.

The decision of the Supreme Court in the Maryland-West Virginia case was in no sense based upon the arbitration of 1877 between

Maryland and Virginia and could not have been based upon it, as West Virginia was not a part of Virginia at the time of that arbitration and could not have been bound thereby. The Supreme Court did, however, consider the action of the arbitrators as persuasive authority on the question involved; and we think that it is likewise persuasive here, as the arbitrators had before them the very question which we are considering and were lawyers of great ability and distinction, one of them, Mr. Jeremiah S. Black, having been Attorney General of the United States. The Supreme Court quotes with approval the following pertinent passages from their report:

"The evidence is sufficient to show that Virginia, from the earliest period of her history, used the south bank of the Potomac as if the soil to low-water mark had been her own. She did not give this up by her constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she
34 expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers (Potomac or Pocomoke), and all improvements which have or will be made thereon.' *By the compact of* 1785, *Maryland assented to this*, and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'

* * * * * * *

"Taking all together, we consider it established that *Virginia has a proprietary right on the south shore to low-water mark*, and appurtenant thereto has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

"*To that extent Virginia has shown her rights on the river so clearly as to make them indisputable.*" (Italics ours.)

While we agree with the learned judge below, that the arbitration of 1877 between Maryland and Virginia was not binding upon the District of Columbia or upon the United States as the sovereign power within the District, the opinion of the arbitrators as to the effect of the compact of 1785 is, of itself, entitled to great respect. As their opinion was adopted by the Supreme Court in the Maryland-West Virginia case, it became authoritative as to the meaning of that document; and there can be no further question that the effect of the compact was to fix the boundary of Virginia at low-water mark on the river.

We come, then, to the question as to whether that boundary opposite the District of Columbia has been changed by subsequent events.

We do not think that it has. In 1791 commissioners were
35 appointed under act of Congress, who selected an area ten miles square to constitute the seat of government of the United States. The area so selected lay along the Potomac, partly in Maryland and partly in Virginia. Acts of both States were passed in that

year under which each ceded to the United States the land embraced within the area which lay within its boundaries. The effect of the act of Virginia was to vest in the United States jurisdiction over the part of the area which belonged to Virginia, i. e., the part of the ten-mile square area on the Virginia side, to low-water mark on the Potomac, as determined by the compact of 1785. By act of July 9, 1849, 9 Stat. 35, Congress passed an act ceding back to Virginia the territory which she had ceded to the United States, the language of the act being as follows:

"All of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction as well of soil as of persons residing or to reside thereon."

We do not follow the Court of Appeals of the District of Columbia in its position taken in the case of Evans v. United States, 31 App. D. C. 544, and Herold v. United States, 284 Fed. 927, to the effect that the compact of 1785 was abrogated by the cession of that portion of the District of Columbia originally granted by the State of Virginia and its recession by the United States. On the contrary, we think that the rights of the State of Virginia in the land in question, as determined by the compact of 1785, were ceded to the United States by the act of cession of 1791, and that exactly the same rights were ceded back to the State by the act of 1846. As said by Mr. Justice Holmes in the case of Marine Ry. v. U. S., 257
U. S. 47 at p. 63, "The original state of things was not
36 changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side."

The decisions of the Court of Appeals to which we have referred are based, we think, upon a misconception of the case of Georgetown v. Alexandria Canal Company, 12 Peters 91, upon which the appellee relies. That was a suit instituted to enjoin the construction of an aqueduct over the Potomac River, on the ground that the piers of the aqueduct obstructed the free use of the river secured to the people living on its borders by the compact of 1785 between Virginia and Maryland. The court held that the citizens of the contracting States were not parties to that compact; that its stipulations would have been subject to change by the States which made it; and that when they ceded to Congress the portion of their territory within the District of Columbia lying on both sides of the river Congress could make any provision for building an aqueduct across the river within that territory that the States could have made by joint action if the territory had not been ceded. Nothing is said in the decision as to the effect of the compact as settling the boundary of Virginia at the low-water mark on the Potomac, nor was that question in any way involved. The fact that, by ceding

the District of Columbia to the United States, Maryland and Virginia vested in the Federal Government all rights with respect to the use of the river reserved to themselves and their citizens by the compact of 1785, could have nothing to do with the question as to whether the boundary of the territory ceded by Virginia was fixed by the compact of 1785 at high or at low water mark, or as to whether the act of 1846, ceding the Virginia portion of the District back to Virginia, should be construed as having reference to the same boundary.

The case of Morris v. U. S., 174 U. S. 196, relied upon by the appellee, is not in point. It is true that in that case it was
37 stated that the grant to Lord Baltimore embraced the Potomac River to high-water mark on the Virginia shore; but the question as to whether the Virginia boundary was at high or low water mark, or how that question was affected by the compact of 1785, was not involved in the decision. The heirs of John and James Marshall were claiming lands on the northern, or District of Columbia, side of the river, under the grant of James II to Lord Culpeper, to which we have referred; and the court merely held that Lord Culpeper acquired no rights to the land there in controversy because of the prior grant to Lord Baltimore. Title or jurisdiction on the Virginia side of the river was in no way involved; and it is manifest that the decision could not be authority for the location of the Virginia boundary at high-water mark as distinguished from low-water mark on the Virginia side.

The case of Marine Ry v. U. S., 257 U. S. 47, s. c. (App. D. C.) 265 Fed. 437, involved, not whether the boundary was at the high or at the low water mark, but whether it extended from headland to headland, so as to include within the boundaries of Virginia a strip of made land lying below the low-water mark within a cove or indentation on the Virginia side. The boundary of Virginia was not established as extending from headland to headland until the award of 1878 under the arbitration with the State of Maryland, which, being after the formation of the District of Columbia, did not, of course, affect its boundary. It was accordingly held that the land there in controversy was not within the boundaries of Virginia, as the original boundary of Maryland extended at least to low-water mark on the Virginia side, and that the courts of the District of Columbia had jurisdiction. On this question the court, speaking through Mr. Justice Holmes, said:

"Except an insignificant portion as to which no special defense was made and which it is agreed may be disregarded, this
38 strip lay below low-water mark until it was filled in by the United States in 1910–1912 by dredging from the bottom of the river and depositing the material on the other side of a riprap wall built on the river bed. * * * The question of the jurisdiction of the trial court and that of the merits very nearly coalesce, as the original title, at least, of Maryland and its jurisdiction were founded

upon the same facts, and as the United States succeeded to the rights of Maryland by the grant of the District completed in 1791. That the original title of Maryland extended at least to low-water mark on the Virginia side it now is too late to deny, in view of the decisions in Maryland v. West Virginia, 217 U. S. 1, 45, 46; s. c. ibid 577, 578; and Morris v. United States, 174 U. S. 196. * * * The award (i. e., of 1878) fixed low-water mark on the Virginia side as the boundary, and is only material if at all as suggesting a claim that the low-water line should be drawn from headland to headland and in that way include the indentation or cove where the United States has filled. But we know of no reason for construing the charter to Lord Baltimore as so limited or that to Howsing as importing such a rule."

The soundness of the decision in Maryland v. West Virginia, supra, was nowhere questioned in the opinion in Marine Ry v. U. S., supra. On the contrary, article 7 of the compact of 1785, upon which the decision in the former case was grounded, was referred to as giving "the citizens of each State full property in the shores of the river." And the Court of Appeals of the District, referring to that case in language which is conclusive of the point involved here, said:

"In the recent case of Maryland v. West Virginia, 217 U. S. 577, 30 Sup. Ct. 630, 54 L. Ed. 888, the court, considering the award of 1878, by which the boundary between the States of Maryland and Virginia was fixed at the low-water line on the Virginia shore, *held, in effect, that this line had been established by the compact of 1785.* The United States was not a party to the award of 1878, and her status with respect to the boundary between the District of
39 Columbia and Virginia was not involved. However, as we interpret the opinion, *it holds that the boundary was established at low-water mark by the compact of 1785*, and unless affected by the exercise of political jurisdiction by the United States, it likewise fixes the boundary of the District of Columbia as ceded by Maryland in 1789, four years after the compact, since whatever territory and right to the soil under the Potomac was ceded to the United States by Virginia in 1789 was receded in 1846." (Italics ours.) (265 Fed. at 441.)

Our attention is particularly called by appellee to the following language of the Supreme Court in the Marine Railway case:

"The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case. It says nothing about the boundary in terms. Without going into the history of the compact or reciting it, we only need to remark that it was a regulation of commerce, and while with a view to opening up a route to the West it provided in article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland, and in article 7 gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves, &c., with a common right to fishing, it left the question of boundary

open to long-continued disputes. It may be laid on one side even if it ever was in force in the District of Columbia, which has been denied on the ground that the compact was abrogated so far as it affected this land by the grant of Virginia and was not revived by the grant of the United States. Evans *v.* United States, 31 App. D. C. 544, 550. See Georgetown *v.* Alexandria Canal Co., 12 Pet. 91."

There is nothing in this, however, which in any way militates against the rule laid down in Maryland *v.* West Virginia holding that the compact of 1785 fixed the Virginia boundary at low-water mark. As said by the Supreme Court, that compact had no
40 bearing on the point involved in the Marine Railway case, for the reason that it merely fixed the boundary at low-water mark and did not determine the disputed question as to the boundary between headland and headland, which was among the long-continued disputes left open by the compact, to which the opinion referred. The query as to whether the compact was ever in force within the district, manifestly refers to those of its provisions which were regulations of commerce and which were before the court in the case of Georgetown *v.* Alexandria Canal Company, supra. We do not understand that this query was intended to draw in question again the point decided in Maryland *v.* West Virginia, that the boundary of Virginia was fixed by the compact at low-water mark. In holding that the boundary of Virginia extended only to high-water mark, and that the court was without jurisdiction of the controversy for that reason, the court below was in error, and the decree dismissing the bill will accordingly be reversed.

Reversed.

41 In United States Circuit Court of Appeals, Fourth Circuit

No. 3026

WASHINGTON AIRPORT, INCORPORATED, APPELLANT

vs.

SMOOT SAND AND GRAVEL CORPORATION, APPELLEE

APPEAL from the District Court of the United States for the Eastern District of Virginia.

Decree

Filed and entered October 24, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in

this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Alexandria, for further proceedings in accordance with the opinion of the court filed herein.

October 24, 1930.

JOHN J. PARKER,
U. S. Circuit Judge.

42 In United States Circuit Court of Appeals

Memorandum re mandate, etc.

On another day, to wit, November 24, 1930, the mandate of this court in this cause is issued and transmitted to the United States District Court at Alexandria, Virginia, in due form.

Same day, the original petition for appeal, order allowing appeal, and bond are returned to the clerk at Alexandria, Virginia.

[Clerk's certificate to foregoing transcript omitted in printing.]

43 Supreme Court of the United States

Order allowing certiorari

Filed March 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 35600. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 678. Smoot Sand and Gravel Corporation, petitioner, vs. Washington Airport, Incorporated. Petition for a writ of certiorari and exhibit thereto. Filed January 24, 1931. File No. 35600.

U. S. GOVERNMENT PRINTING OFFICE: 1931